CORRESPONDENCE.

Editor, "Virginia Law Register:"

Permit me space in your columns to correct a statement, to which there has been given some publicity, to the effect that Judge W. W. Moffett, who as Judge of the Circuit Court of Floyd County, presided at three of the trials of John W. Richards, charged with the murder of M. K. Francis, **volunteered** as a witness on behalf of the accused on his fifth and last trial, which resulted in a verdict of "not guilty."

The statement in question is inaccurate, and inasmuch as it is calculated to create a false impression among the members of the profession, I ask leave to state the facts in that connection:

Judge Moffett presided at the second, third and fourth trials, and took very full notes of the testimony each time.

On the third trial, several of the witnesses for the prosecution made statements which differed materially from their former testimony. These previous statements, some of which were greatly in favor of the accused, his counsel sought to prove by Judge Moffett's notes, offering to show by evidence **aliunde** that those notes were correct. We were not, however, permitted to use those notes.

That trial resulted in a verdict of "guilty," and the accused was sentenced to death. On a writ of error, this verdict and judgment were set aside and a new trial ordered, on grounds not necessary to be here stated. The Appellate Court, however, overruled the assignments of error based upon the refusal of the court to allow the Judge's notes to be used. (Richards Case, 107 Va. 881.)

On the new trial, which was the fourth, the importance of proving what appeared in the Judge's notes, the absolute accuracy and impartiality of which were never questioned, was presented most forcibly to the prisoner's counsel.

Under the conditions as they then existed, the only persons who could testify to those facts were, Judge Moffett, whose notes we tried in vain to use on the former occasion, and counsel for the defense, who had taken similar notes.

To avoid putting any of the last-named gentlemen on the stand, it was determined, without any consultation with Judge Moffett, to summon him as a witness on behalf of the accused. Accordingly, some time in advance of the trial, so that another Judge might be readily obtained, a summons was served upon Judge Moffett, at the instance of the defense. At the same time he was summoned as a witness for the Commonwealth, at the instance of the Commonwealth's Attorney. The Judge thereupon notified counsel that he would not recognize either summons, stating that inasmuch as the facts to which he could testify could also be testified to by them, he did not think a case had been presented which required him to

suffer himself to be used as a witness, though in a proper case he would not hesitate to retire from the bench and submit himself to examination as a witness.

In support of his position he referred to § 1909, of Wigmore on Evidence.

It is there said:

"That a judge may give testimony as a witness in a trial before a court of which he is a member, seems in the classical English practice not to have been doubted, though the precedents are scanty. It is not clear whether a judge so testifying was regarded as bound to retire from the Bench thereafter during the trial; but the propriety and legality of his taking the stand when needed seem to have been assumed."

The learned author then, after reciting the various objections urged to a judge taking the stand as a witness, and after pointing out the little weight that exists to those objections, adds:

"Since the trial judge has no interest to subject himself, or counsel, or jury, to these supposed embarrassments, it may properly be left to his discretion to avoid them, when the danger in his opinion arises, by retiring from the Bench before the trial begun, or by interrupting and postponing the trial and securing another judge."

When the case was called for trial, the Commonwealth announced in open court that it released the Judge from the summons which had been issued on its behalf, but the prisoner declined to make a similar release. Nevertheless, the Judge declined to suffer himself to be called as a witness, and the trial proceeded, Judge Moffett presiding to the end.

On that trial the witnesses for the prosecution persisted in their changed statements, and it thereupon became absolutely essential to contradict them. The only witnesses then available for that purpose were the counsel for the accused, who had participated in, and had taken notes at the former trials, and they were accordingly put upon the stand as witnesses in behalf of the accused, they testifying from their notes, the substantial accuracy of which was not questioned.

In his argument before the jury, the Commonwealth's Attorney, nevertheless, criticised very severely the prisoner's counsel for appearing as witnesses in his behalf, although he himself had, during the previous trials, taken the stand as a witness for the Commonwealth. The Commonwealth's Attorney, during this trial, requested the trial judge that, in case the jury disagreed, he be allowed to enter a **nol. pros.**, as he thought such a condition would then be presented as would not justify a further prosecution.

This trial ended in a hung jury, but the Commonwealth's Attorney insisted upon still another trial, and from that stand nothing could move him. Thereupon, Judge Moffett stated from the Bench

in substance as follows: That he had become convinced he had made a mistake in not responding to the previous summons; that he did not think he had the right to force counsel for the prisoner, reputable practitioners in his court, whom he knew to be gentlemen of the highest character, to take the stand and then be subjected to such criticism as the Commonwealth's Attorney had seen fit to indulge in; that in his opinion the conditions indicated by Mr. Wigmore, in the section above quoted, under which it would become his duty to appear as a witness, if summoned, had arisen. Therefore, if at the next trial, he was summoned, he would get the Governor to designate another judge to preside in the case and he would respond to the summons.

The Commonwealth's Attorney still insisting, a fifth trial of the case was thereupon set for the 3rd of August, 1908. The Judge was summoned as a witness on behalf of the accused and Judge Ingram was in due course commissioned to preside, and did preside in his stead.

At that trial, some of the witnesses, to contradict whom Judge Moffett was summoned, were not called by the prosecution, others went back to their original statements, and as to two others, Judge Moffett's notes were read to the jury by consent. Consequently, he did not take the stand at any time.

This trial resulted in a verdict of "not guilty." Thus after three years of imprisonment, and five trials, an unprecedented number in Virginia at least, consuming in the aggregate considerably more than two months, to say nothing of the time spent on the writ of error, the accused was acquitted and discharged.

It may not be amiss in this connection to call attention to an interesting incident which arose in this case: Between the second and third trials, the prisoner's father, mother and brother, material witnesses in his behalf, all died within a few days of each other, and after mature consideration by the court, their evidence as given at a former trial, was permitted to be related to the jury, a ruling which a critical consideration of all the authorities on the subject will show was plainly right, notwithstanding certain **dicta** to the contrary found in some of the Virginia decisions.

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